

NO. 89-249

Supreme Court, U.S.

FILED

SEP 18 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Supreme Court of The
State of New Jersey

PETITIONER'S REPLY BRIEF

Elaine Kenna
33-06 92nd Street
Jackson Heights, N.Y. 11372
(718) 458-9406

Clarifying Statement of Questions Presented for Review

1. Petitioner is requesting a writ of certiorari be issued, so this Court may resolve questions in regard to rights guaranteed under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, necessary as a result of failure on the part of the courts of New Jersey to address Constitutional issues brought to their attention. The State of New Jersey claims that the question presented for review, is whether this Petitioner's rights were denied by the ruling rendered in the state trial courts, that under the facts of the case, Petitioner is guilty of resisting arrest. To the contrary, the record shows that appeals were taken essentially on legal grounds. The central question in the case is in regard to the sufficiency of evidence and that issue is a question of law and not of fact.

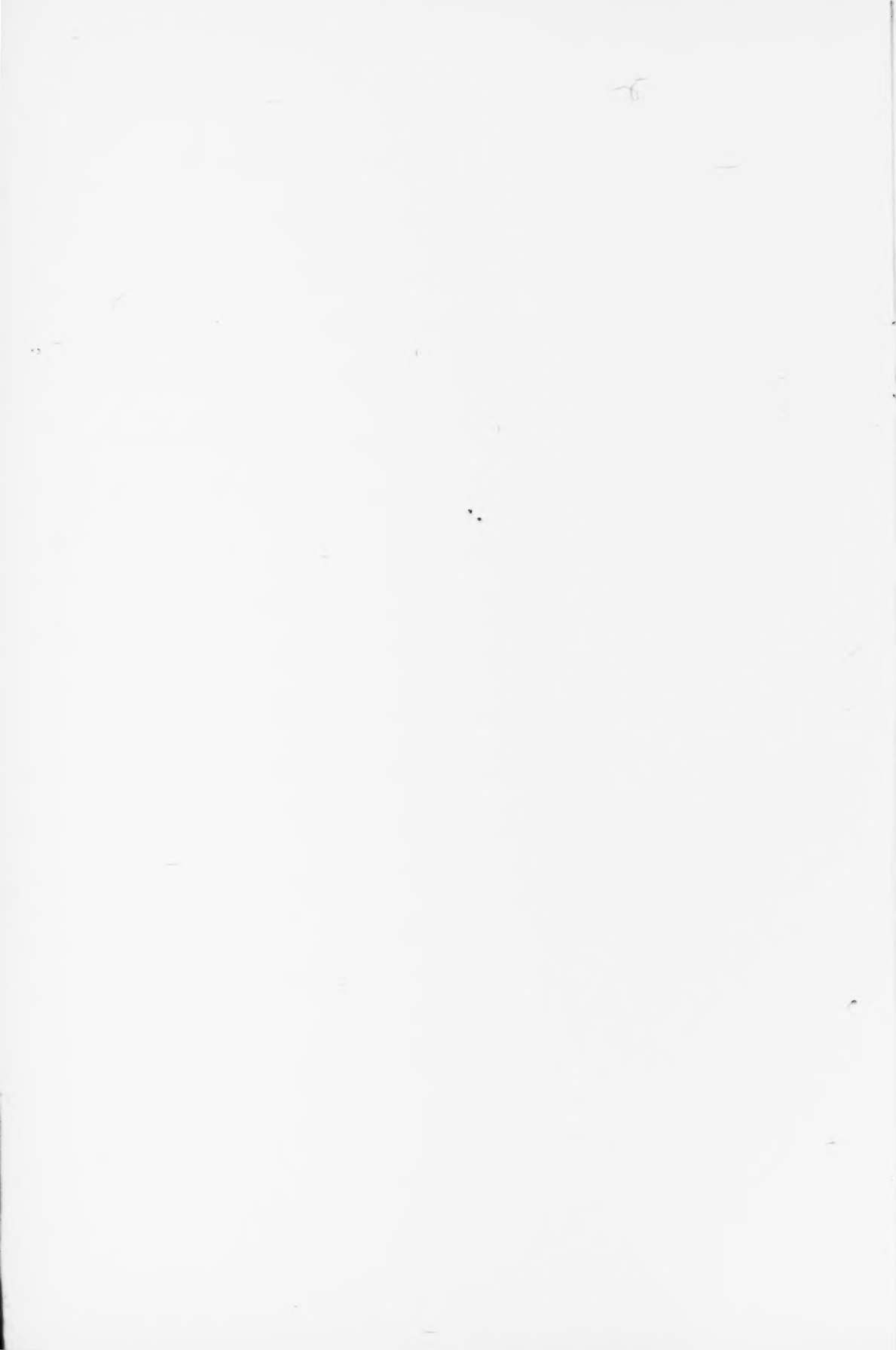


TABLE OF CONTENTS

	<u>PAGE</u>
1. CLARIFYING STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
2. CLARIFYING STATEMENT OF THE CASE	2
3. PETITIONER'S REPLY TO LEGAL QUESTIONS RAISED IN RESPONDENT'S BRIEF IN OPPOSITION	8
4. CONCLUSION	10

CASES CITED

	<u>PAGE</u>
State v. Johnson, 42 N.J. 146 (1961)	6
United States v. Caldwell, 820 F.2d 1395 (5th Cir. 1987)	7
United States v. Gomez, 846 F.2d 557 (9th Cir. 1988)	7

STATUTES CITED AND CONSTITUTIONAL AUTHORITY

	<u>PAGE</u>
N.J.S.A. 2C:12-1(a)(1)	1
N.J.S.A. 2C:29-1	4
N.J.S.A. 2C:29-2	1
28 U.S.C. sec. 2254	6
Constitutional Amendments Fourth, Fifth, Sixth and Fourteenth	i

NO. 89-249

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Supreme Court of The
State of New Jersey

PETITIONER'S REPLY BRIEF

The Petitioner, Elaine Kenna, respectfully requests that this Court grant the petition for a writ of certiorari, to review the judgment of the Supreme Court of New Jersey, denying certification, and of the Superior Court of New Jersey, Appellate Division, affirming petitioner's conviction of an attempt to cause bodily injury to P.O. Douglas Brown by punching him in violation of New Jersey Statute 2C:12-1(a)(1), and purposely prevent a law enforcement officer, P.O. Douglas Brown, from effecting a lawful arrest, in violation of New Jersey Statute 2C:29-2, the former charge being merged into the latter.

CLARIFYING STATEMENT OF THE CASE

Evidence deemed to be sufficient to support a conviction of two charges brought by the State of New Jersey was comprised solely of testimony of Officer Brown, which testimony relative to those charges is found in its entirety in the judgment of the Appellate Division, as corrected by the Petitioner in papers before this Court, and testimony of Officer Schillizzie, which the Appellate Division has stated contains few relevant observations of defendant with respect to Brown. Petitioner, by restoring a sentence in the middle of Officer Brown's testimony that was omitted from the judgment of the Superior Court of New Jersey, Appellate Division, has shown the Constitutional dimensions of the unintelligible portions of the record. It appears that officer's handcuffs weren't discharged at the time of the arrest, and his actions immediately before his testimony that, "I told [defendant] she was under arrest" do not reveal the actions of a person witnessing a crime:

Q What, if anything, did you observe upon your arrival?

A (Indiscernible, microphone) my car around the corner.

Walked through the (indiscernible) a large crowd on the curb. I'd estimate there was about 30 people. (Indiscernible) and I saw (indiscernible) my attention became focused on Officer Schillizzie on the ground attempting to put his handcuffs on a man.

Q Who was this man?

A (Indiscernible) Michael Gallagher.

Q And then what happened?

A At that point in time I also observed the defendant, Miss Kenna, (indiscernible, microphone) choking and (indiscernible).

Q How long did you observe Miss Kenna? (R. 40)

A Well, from the time it took me to walk from west (R. 40)
(indiscernible).

Q Can you discribe (indiscernible) with her after
indiscernible)?

A I would describe her as enraged at having been
pulled from (indiscernible).

Q Well, what (indiscernible, microphone)? Did you
see Miss Kenna strike Officer Schillizzie?

A Strike — no. I saw the choking.

Q Then what happened?

A I had to put the (indiscernible). At that point I
walked back towards the officer to make sure he
was in control of the situation. And as I said, i had
my weapon (indiscernible).

Q Did you say anything to the defendant?

A Not (indiscernible)

Q Would you discribe the strike?

A (Indiscernible, chair squeaking, not near microphone.)

Q Then what happened?

A At that time — at that time I told her she was under
arrest

(Continues in judgment of Appellate Division)

In regard to Officer Schillizzie's testimony in support of a
charge identical to that of Officer Brown that Petitioner purposely
prevent a law enforcement officer from effecting a lawful arrest,
the record shows that Schillizzie, not Kepreos was the bystander.
Kepreos had come out of the crowd and pushed the defendant, (R. 79)
causing her to call for help. Her call was heard by everyone who (R. 59)
testified at the trial except for Officer Brown, who had not yet
arrived at the scene, and Officer Schillizzie who was unable to
recall her call for aid. He also testified that the Petitioner had (R. 28)
struck him just once, and that was at a time he was concentrating (R. 21)

on Gallagher, while several people were hitting him on the back (R. 31) he saw the defendant on his left, next to him, on the same level as (R. 34) he was, when looking up, as he was checking his revolver. How (R. 36) the Petitioner had grabbed him from behind is not in his testimony, but it is on the record that the Petitioner's sister was pulled by Brown. Also in evidence is corroborated testimony that Officer Schillizzie had never informed Gallagher that he was under arrest. (R. 63) In any event, the resolution of issues in regard to the testimony of Officer Schillizzie is found in the findings of the Appellate Division, (Petition A-1, 12) wherein that tribunal expressed disbelief that Judge Cochia's reference to defendant being on top of Schillizzie is controlling, except, perhaps, as to Brown's decision to arrest her. The Municipal Court judge had found there to be no punching out at Officer Brown., but found the Petitioner had been flailing and thrashing, with no testimony in regard to either flailing or thrashing. His finding was that the Petitioner would probably have been found guilty of N.J.S.A. 2C:29-1, although such a guilty verdict requires a commission of an act that is unlawful in and of itself.

Thrashing and flailing are not such acts.

The relevance of the inclusion in the instant proceeding of charges to which the Petitioner has been found not guilty, including statements to the effect that the Petitioner caused injuries to

Officer Schillizzie's ear and knee, as well as statements that the defendant was found guilty of assault at the first trial only points up the need for the writ or certiorari to issue. Testimony in the Newark Municipal Court in regard to injuries is as follows:

Schillizzie: Direct

Q Did you — Did you sustain injuries?

A I was transported to the hospital. I had knee injuries and an injury to my left ear.

Schillizzie: Cross

Q And even though you were injured and all that, you just didn't file any charges?

A No, I did not.

Q Even though going to the hospital — by the way do you have any medical records concerning that injury and that visitation concerning going to the hospital?

A Yes, I do.

Mr. Ford: I object. As to the relevancy.

The Court: Well, you opened up the door because I haven't seen the relevancy either. It would seem to me that the injury that would have been sustained, I imagine, although I don't know this, were probably a result of the incident involving Mr. Gallagher. R. 23:

In regard to the guilty verdict that was rendered after the first trial that was declared a mistrial, and for which there is no recorded testimony of Officer Brown, that record was discussed by counsel at the second trial:

The Court: I just want to see, frankly, if it's appropriate for us to start ab initio or if the matter should be better handled by the same Judge that handled it last time. I don't know if that issue's been resolved.

Mr. Oliveras: Your Honor, I would have certain objections to that because — R. 7

The Court: To what?

Mr. Oliveras: To — to having the same Judge handle the same case. For one reason, your Honor, there may be — objections to be brought which should have been brought then. And at the same time there were — there were circumstances that I would not be — that I would say there were errors made by the — by the Judge at that time. R. 7

Petitioner finds the cases cited by the State of New Jersey to be only supportive of her claim as she pursues her rights to seek a writ of certiorari under authority of the Constitution of the United States, and provisions of Title 28, sec. 2254. The Petitioner is not in custody, and does not seek a writ of habeas corpus. Rather, evidence suggests that the judgment of the Superior Court of New Jersey, Appellate Division, for which the Supreme Court of New Jersey has denied certification, is not correct, and should not be permitted to stand.

There is no precedent in the the cases cited by the State of New Jersey that applies to the facts of the current case. In State v. Johnson, (42 N.J. 146 (1961) the State had presented creditable evidence in the form of testimony that established facts such as a low rate of speed of the vehicle, as well as scientific evidence as to the consumption of alcoholic beverages. Deference had to be given to these trial court findings upon trial de novo, and credibility rested on a basis where the judge's opportunity to observe the demeanor of the witnesses had a bearing due to the nature, clarity and testimony supported by evidence.

In regard to the matter of United States v. Caldwell, 820 F.2d 1395 (5th Cir. 1987), as that case established that a reviewing court can in exceptional circumstances depart from a trial court's finding made on the basis of that trial court's determination in regard to the credibility of witnessess, facts establish circumstances as stated.

United States v. Gomez, 846 F.2d 557 (9th Cir. 1988), concerns restriction of cross examination during a pretrial suppression hearing on a specific matter, in which second guessing the trial court has substantially less basis than in this case.

Precedents set in the other cases cited by the State of New Jersey can similarly be dismissed as simply being inappropriate.

**PETITIONER'S REPLY TO LEGAL QUESTIONS
RAISED IN RESPONDENT'S BRIEF IN OPPOSITION**

The precedential value and importance of the case has been made clear in papers before the Court. Unclear and in need of briefing is the position of the State of New Jersey in regard to the rights of a person charged with a crime to make a retraxit plea, and the relationship of that plea to a speedy trial. Similar questions have arisen in regard to the Petitioner's attempt to remove the cause to a Federal Court. Throughout, the exercise of those privileges, the State of New Jersey was in control of, and did exercise their right to continue process and summon the Petitioner into the New Jersey courts. The second trial was scheduled before the Petitioner brought the matter to the United States District Court on October 16, 1988, and the trial in Newark Municipal Court was maintained for October 19, 1988, at which time both sides appeared.

Petitioner's point in regard to the right to confront her accusers is well taken considering the record below in which the complaining witness came into Newark Municipal Court more than a year after she had been charged with assault, and that complaining witness was not even questioned in regard to such an assault. The other complaining witness forgot facts material to the case. The incident had started at Newark Airport with two police officers ignoring the Petitioner's call for help, at which time one of the

officers left the area after Officer Schillizzie had at that point (R. 81) attempted to arrest Gallagher who had gone to Petitioner's aid.

The Petition to this Court is for relief from the final decision of a state court, and in no way is a petition for removal of a prosecution before trial, which has been abandoned as counsel has stated.

CONCLUSION

For the reasons stated above, Petitioner, Elaine Kenna, respectfully prays this Court will issue a Writ of Certiorari to the United States Court of Appeals for the Supreme Court of the State of New Jersey.

Respectfully submitted,

Elaine Kenna

DATED:

